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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-791

GOLDEN TRIANGLE BROADCASTING, INC.,
Petitioner

v.

JOSEPH M. FIELD,
Respondent

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

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Respondent has first raised, in its Brief in Opposition to the instant Petition for a Writ of Certiorari, the argument that the Supreme Court of Pennsylvania was justified in ordering transfer of Petitioner's 50,000 watt facility to Respondent because of "intervening" or "changed" circumstances related to the said 50,000 watt facility. Respondent bases this argument on a contention that these "intervening" or "changed" circumstances were litigated below. Petitioner believes that Respondent's new argument completely distorts the facts and the record below and accordingly files this Reply to Respondent's Brief.

Reply to Respondent's Brief.

As pointed out in the Petition for a Writ of Certiorari, both parties and the trial court agreed during trial, and the parties agreed on appeal, that the ownership of the 50,000 watt facility, and any rights with respect thereto, were not in issue in this case (Petition, pages 5-7). Significantly, Respondent's Brief does not deny these facts.

Rather, Respondent's Brief argues that Petitioner did have a hearing with reference to the 50,000 watt facility. This argument is based on complete distortions of the facts relating to (1) the exclusion of evidence at trial, upon objection by Respondent, concerning the 50,000 watt facility, which had been offered by Petitioner to show that specific performance of the contract relating to the 1,000 watt facility would be inequitable, and, (2) Petitioner's argument on appeal that the exclusion of such evidence constituted error.

For example, at page 2 of its Brief, Respondent states that Petitioner (1) offered testimony regarding its construction of the 50,000 watt facility and (2) argued that that construction made specific performance of the contract regarding the 1,000 watt facility inequitable. To that extent Respondent is correct, but Respondent fails to point out that the trial court sustained Respondent's objection that such testimony was "totally irrelevant" and no such testimony or evidence was admitted or considered, therefore, by the trial court to any extent. (R. 337a-349a)[1].

Similarly, at page 7 of its Brief, Respondent again states that Petitioner "adduced" testimony regarding

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1. "R" refers to the printed Record filed in the Supreme Court of Pennsylvania.

the construction of the 50,000 watt facility at trial with regard to its equitable effect, and then states that the trial court "simply ignored that construction". Respondent obviously intends to imply that the trial court ignored the construction of the 50,000 watt facility after a hearing, since the first sentence of that same paragraph reads: "Furthermore, there is no factual basis for Respondent's [sic][2] contention that it was never heard by the Pennsylvania courts on the 50KW facility." Again, the trial court did not "ignore" evidence which that court received *but, rather, expressly excluded that evidence from introduction or consideration upon Respondent's objection that the 50,000 watt facility was not involved in the proceeding.* (R. 337a-349a).

Respondent further attempts to argue that a hearing with reference to the 50,000 watt facility was had before the Supreme Court of Pennsylvania on appeal, expressly stating that Petitioner raised the "issue" or "facts" regarding the 50,000 watt facility (Respondent's Brief, pages 3, 5 and 7) before that court. As its sole support for this argument, Respondent refers to pages 64 and 65 of Petitioner's Appeal Brief (Respondent's Brief, App. B.).

On that basis, Respondent would have this Honorable Court believe that Petitioner had a hearing on the issues with reference to the 50,000 watt facility. In fact, Petitioner's argument to the Supreme Court of Pennsylvania was that *the exclusion of evidence* regarding the 50,000 watt facility by the trial court *was in error* because it would have been, and was, relevant to the

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2. Obviously should read "Petitioner's".

question of the appropriateness of the remedy of specific performance of the contract relating to the 1,000 watt facility (see pages 61 through 65 of the Petitioner's Brief on Appeal, Appendix "I" hereto). The making of such an argument on appeal obviously neither places the rights of the parties with reference to the 50,000 watt facility at issue nor constitutes a hearing on those rights. *Rather, the facts are that the parties agreed, both at trial and on appeal, and the trial court so held, that the rights of the parties with reference to the 50,000 watt facility were not in issue in this case.*

The remainder of Respondent's Brief argues that the decision of the Supreme Court of Pennsylvania with regard to the 50,000 watt facility was proper and makes reference to numerous alleged facts regarding the 50,000 watt facility and its construction. Respondent, however, nowhere makes reference to any evidence or portions of the record below where those facts (or "intervening" or "changed" circumstances as Respondent describes them) were introduced into evidence or were litigated, other than by the misleading implications discussed above. The reason for this omission is obvious — Petitioner has never had a hearing on the question of its rights with reference to the 50,000 watt facility, or the

price, or the circumstances surrounding the construction of the 50,000 watt facility, and, therefore, has been deprived of its property without due process of law.

Respectfully Submitted,

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APPENDIX I

Excerpt from Petitioner's Brief on Appeal to the Supreme Court of Pennsylvania

A further reason why the remedy of specific performance is wholly inappropriate in this case is that the granting of such remedy places the parties in an impossible position that clearly was not contemplated when the August 14, 1968 letter was signed.

The letter of August 14, 1968 specifically referred to the transfer of Seller's FCC construction Permit to increase the power of WEEP Radio Station to 50,000 watts and the option to purchase or lease a new 50 kilowatt transmitter site. Subsequently, during the pendency of this litigation, defendant obtained extension of the construction permit and proceeded to construct the facility itself (337a-338a). During the trial, defendant offered to prove the substantial expense it had incurred in such construction, which offer was rejected by the Trial Judge (Offer Exhibit "1"; 397a-399a; 338a-349a). Thereafter, upon the plaintiff's stipulation that the new facility was not covered by the August 14, 1968 letter and that he did not want that facility, the lower court specifically excluded the new 50 kilowatt facility from its decree but nevertheless granted specific performance with respect to the previously existing 1 kilowatt facility

We submit that the ruling of the Trial Judge which excluded defendant's offer of proof with respect to the 50 kilowatt facility as well as the subsequent grant of specific performance as to the 1 kilowatt facility constituted patent error. It is abundantly clear that specific performance cannot be granted as to the 50 kilowatt facility not in existence on August 14, 1968. Everyone

concerned, including the plaintiff and the Trial Judge, were in complete agreement on this point. However, for the lower court nevertheless to grant specific performance as to the 1 kiolwatt facility, without accepting evidence as to the status of the 50 kilowatt facility and the changed conditions that exist because of its construction, constituted a refusal by the Court to consider the effect of its decree and was highly improper.

In so proceeding, the lower court based its ruling on the ground that defendant could not defeat the plaintiff's claim for specific performance by having voluntarily engaged in subsequent conduct which rendered the alleged contract incapable of performance. However, the construction of the 50 kilowatt facility by defendant was not in any way improper or devious but rather was done in the ordinary course of business and, and directives. This was made abundantly clear by the more importantly, in accordance with FCC regulations Commission itself in a Memorandum Opinion and Order adopted October 21, 1970, released October 28, 1970, in a proceeding captioned *"In re* Application of Golden Triangle Broadcasting, Inc., Radio Station WEEP, Pittsburgh, Pennsylvania, for license to cover construction permit for changed facilities and request for program test authority", docketed at File No. BL-12753.* In that opinion and order, the Commission approved defendant's request to conduct program test authority for its new 50 kilowatt facility preliminary to the final issuance of a license to operate the facility.

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*This Memorandum Opinion and Order, which is a matter of public record, is reproduced at the end of this brief for the convenience of the Court as an Appendix.

Appendix I.

As noted by the Commission in its opinion, plaintiff opposed the issuance of such authority to defendant on the ground that this litigation was pending and the commencement of operation of the 50 kilowatt facility may mean that the former facility, *i.e.,* the 1 kilowatt facility, may no longer exist "either legally or physically". The Commission rejected the plainttiff's position as being "without merit" and, in doing so, made the following highly significant statements (at pp. 2-3):

> "In issuing a construction permit to Golden Triangle to increase the operating power of WEEP to 50 kw, a finding was made that the construction of appropriate facilities thereunder and operation of the station with such facilities would serve the public interest, convenience and necessity. *Once the permit was issued, Golden Triangle was under an obligation to construct these facilities in a diligent manner,* and upon completing construction, was entitled to request, pursuant to section 73.96(a) of the rules, authority to commence program tests with its new operation."

Thus, as specifically found by the Commission, once the construction permit was issued, defendant was *obligated* to proceed with the diligent construction of the new 50 kilowatt facility. Accordingly, by reason of its compliance with FCC requirements and directives, it was blatantly unfair and improper for defendant to have been precluded in the instant proceeding from proving the consequences of such action and the changed circumstances that exist as a result.

As also noted in the FCC's opinion and order, with the operation of the new 50 kilowatt facility, the former

1 kilowatt facility is utilized only as an auxiliary transmitter. In other words, the 50 kilowatt facility is now the primary broadcast facility and the 1 kilowatt facility is used only in a secondary capacity in the periods of not more than ½ hour before sunrise in Pittsburgh according to the season or temporarily in the event of a breakdown of the 50 kilowatt transmitter.

Under these circumstances, the lower court's decree of specific performance places the parties in an impossible situation that manifestly was not contemplated when the August 14, 1968 letter was signed. An affirmance of that decree would result in a division of the two facilities and the licenses to operate them, which would leave defendant without an auxiliary transmitter and would give plaintiff an auxiliary transmitter for 50 kilowatt facility which he would not own. Moreover, under FCC rules, the two facilities could not be operated independently since two transmitters cannot broadcast on the same frequency in the same area.

As previously mentioned, defendant acted properly in constructing the 50 kilowatt facility and in accordance with FCC directives. Neither the defendant's ownership of that facility or its right to operate it are in dispute. Thus, the issue is limited to a proper determination of the rights with respect to the 1 kilowatt facility.

Under these circumstances, and for all of the reasons discussed above, we respectfully submit that the remedy of specific performance is wholly improper and inappropriate in this case. Not only is the alleged contract not sufficiently clear and complete as to be capable of being specifically enforced, but the use of such a

remedy, by reason of the changed conditions that now exist, would place the parties in an impossible position. Accordingly, we respectfully submit that if plaintiff is entitled to any remedy at all, which defendant strenuously denies, such remedy should be limited to a remedy at law for damages.

Conclusion.

The decree granting specific performance should be reversed. A decree should be entered in favor of defendant. Alternatively, the action should be remanded for hearing on the issue of damages for breach of contract.

Respectfully submitted,

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